

STATE OF MICHIGAN
COURT OF APPEALS

IRENE LATHROP and GEORGE LATHROP,

Plaintiffs-Appellants,

v

MEIJER, INC.,

Defendant-Appellee.

UNPUBLISHED

July 25, 1997

No. 191947

Grand Traverse Circuit Court

LC No. 95-013184 NO

Before: Jansen, P.J., and Wahls and P.R. Joslyn*, JJ.

MEMORANDUM.

In this negligence action predicated on premises liability principles, plaintiff appeals by right summary disposition in favor of defendant, granted by the Grand Traverse Circuit Court on the basis of the open and obvious danger principle.

There appears to be a factual dispute as to whether defendant or its employees had placed a warning cone on the floor near the hazard, consisting of spilled liquid, or whether the warning cone, possibly having been initially placed there, had been moved as an employee prepared to mop up the spill. Even accepting defendant's version of the incident, however, the existence of a single warning cone did not demarcate either the area of the spill or the area in which the defendant's employee was actively working to eliminate the problem. Given the amount of pedestrian traffic in the vicinity, even assuming that the presence of the cone made the danger open and obvious, nonetheless defendant had reason to expect that the pedestrian traffic might distract plaintiff's attention, so that she would not discover what is obvious, or fail to protect herself against it, as well as to anticipate that plaintiff would proceed to encounter such known or obvious danger because, to a reasonable person in her position, the advantages of doing so would outweigh the apparent risk, an issue principally of comparative negligence rather than lack of duty. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 611-612; 537 NW2d 185 (1995), quoting Restatement of Tort 2d, §343A, Comment f. Reasonable minds could differ on this issue, and accordingly summary disposition was erroneously granted.

* Circuit judge, sitting on the Court of Appeals by assignment.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Myron H. Wahls

/s/ Patrick R. Joslyn